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In The

Supreme Court of the United States

JUSTIN JONES, Director of the Oklahoma Department of Corrections,

Petitioner,

vs.

LARRY WILSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of this Court's decision in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), a federal habeas court may confer a liberty interest on a State prison inmate in a particular credit-earning level, based on the language of a State statute and prison regulations, where the inmate suffers nothing more than the loss of the opportunity to earn credits toward early release?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION OF THE TENTH CIRCUIT THAT A STATE INMATE HAS A LIBERTY INTEREST IN REMAINING AT A PARTICULAR EARNED CREDIT LEVEL CONFLICTS WITH THIS COURT'S DECISION IN *SANDIN V. CONNER*	7
A. The Tenth Circuit's decision has violated *Sandin* by parsing the language of the regulations to find a State-created liberty interest	9
B. The Tenth Circuit's finding that Respondent lost more than an opportunity to earn credits misinterprets the way inmates in Oklahoma earn credits	13
C. The Tenth Circuit's finding that Respondent's misconduct conviction inevitably affected the duration of his sentence is contrary to *Sandin* because it incorrectly views the effects of the conviction in hindsight	16

TABLE OF CONTENTS – Continued

Page

D. The Tenth Circuit's decision may result in serious repercussions if left unchecked 18

II. THE TENTH CIRCUIT'S DECISION REPRESENTS A SPLIT AMONG THE CIRCUITS AS IT CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT ON THE SAME IMPORTANT MATTER 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES CITED

Bulger v. U.S. Bureau of Prisons, 65 F.3d 48 (5th Cir. 1995) 13, 16

Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994) 15

Gamble v. Calbone, 375 F.3d 1021 (10th Cir. 2004) 7

Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) 10, 11

Higgason v. Farley, 83 F.3d 807 (7th Cir. 1996) 13, 16

Malchi v. Thaler, 211 F.3d 953 (5th Cir. 2000) 6, 20, 21

Montgomery v. Anderson, 262 F.3d 641 (7th Cir. 2001) 14, 15

Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) 8

Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) ..... *passim*

Tomlin v. State ex rel. Department of Corrections, 814 P.2d 154 (Okla. Crim. App. 1991) 15

Town of Castle Rock, Colo. v. Gonzales, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) 18

Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) 8

Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005) 12

Wilson v. Jones, 430 F.3d 1113 (10th Cir. 2005) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) 10, 11, 12

Zimmerman v. Tribble, 226 F.3d 568 (7th Cir. 2000) 13, 16

FEDERAL STATUTES CITED

28 U.S.C. § 1254(1) 1

STATE STATUTES CITED

Okla. Stat. tit. 57, § 138 ..... 2, 16

OTHER CITES

U.S. Const. Amend. XIV, § 1 2

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court to grant a petition for writ of certiorari to review the Opinion of the United States Court of Appeals for the Tenth Circuit entered December 7, 2005. *See Wilson v. Jones*, 430 F.3d 1113 (10th Cir. 2005).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit has been reported as *Wilson v. Jones*, 430 F.3d 1113 (10th Cir. 2005). It is reprinted at App. 1-22 of the appendix. The Order of the United States Court of Appeals for the Tenth Circuit denying rehearing, which reflects that five judges would have granted the petition, has not been reported and is reprinted at App. 23-24 of the appendix. The Report and Recommendation and the Order and Judgment of the United States District Court for the Western District of Oklahoma from which appeal was taken by Respondent are reprinted at App. 25-36 of the appendix.

STATEMENT OF JURISDICTION

The Opinion of the Tenth Circuit was entered on December 7, 2005. Petitioner timely filed a Petition for Rehearing and Request for En Banc Consideration on December 20, 2005. The Order denying petition for rehearing was entered on March 23, 2006, and noted that five judges voted to grant the petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Okla. Stat. tit. 57, § 138:

(B) The Department of Corrections is directed to develop a written policy and procedure whereby inmates shall be assigned to one (1) of four (4) class levels determined by an adjustment review committee of the facility to which the inmate is assigned. The policies and procedures developed by the Department shall include, but not be limited to, written guidelines pertaining to awarding credits for rehabilitation, obtaining job skills and educational enhancement, participation in and completion of alcohol/chemical abuse programs, incentives for inmates to accept work assignments and jobs, work attendance and productivity, conduct record, participation in programs, cooperative general behavior, and appearance. When assigning inmates to a class level the adjustment review committee shall consider all aspects of the policy and procedure developed by the Department, including but not limited to, the criteria for awarding credits required by this subsection.

* * *

(D)(1)(a) Class level 1 shall include inmates not eligible to participate in class levels 2 through 4, and shall include, but not be limited to, . . . inmates subject to disciplinary action.

Oklahoma Department of Corrections Policy OP-060107(I)(C)(2)(a)(6):

An inmate's incarceration will be based on a level system that determines custody level, job status, program status, and privileges earned.

* * *

At least once every 120 days, an inmate must be reviewed by the classification committee, with no less than three staff members in attendance. Staff members, at a minimum, will include the inmate's case manager, a correctional officer or correctional counselor, and will be chaired by the unit manager. In order for an inmate to promote, he/she will meet the following requirements. . . .

Inmates may be assigned to Level 1 whenever deemed appropriate by the facility/unit classification committee. Level 1 assignment is mandatory under the following circumstances:

* * *

Upon conviction of any misconduct, effective the date of the misconduct.

STATEMENT OF THE CASE

This case presents this Court with the opportunity to provide necessary guidance to the many lower courts which must address whether a State prison inmate has a constitutionally protected liberty interest in the particular

credit-earning level to which he is assigned. Such a determination is required to resolve the issue of whether an inmate is entitled to due process when he is reclassified to a lower level, where he would earn fewer credits toward early release.

In his habeas petition to the United States District Court for the Western District of Oklahoma, Respondent raised one ground for relief, that his constitutional rights were violated when he was convicted of a misconduct in a prison disciplinary proceeding which was unsupported by evidence. Petitioner argued in response that Respondent had failed to exhaust his State court remedies; that Respondent's claim was moot because his punishment, which had been suspended for 90 days, had never been carried out; and that Respondent's misconduct conviction was indeed supported by sufficient evidence.

The Honorable Bana Roberts, United States Magistrate Judge, issued a Report and Recommendation wherein she acknowledged Petitioner's exhaustion argument, but found Respondent's claim to be without merit (App. 27-29). Magistrate Roberts found Respondent had failed to state a claim which invoked the procedural protections of the Due Process Clause, since his claim regarding his classification level did not state a constitutional claim (App. 29-33). Respondent objected to the magistrate's findings, but the Honorable Stephen P. Friot, United States District Judge, adopted the Report and Recommendation and ruled in favor of Petitioner (App. 34-36).

Respondent appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit reversed the judgment of the District Court, finding that Respondent's mandatory demotion in credit-earning status as a

result of the misconduct conviction inevitably affected the duration of his sentence, thus giving him a liberty interest in the disciplinary action. *Wilson v. Jones*, 430 F.3d 1113, 1120 (10th Cir. 2005). The Circuit Court then reviewed Respondent's misconduct conviction to determine whether he had received due process. *Id.* at 1123. The Tenth Circuit concluded he had not, and ordered that the misconduct conviction be reversed and expunged from Respondent's record, and that Respondent's former status in earning credits be restored. *Id.* at 1123-24.

Respondent was scheduled to be released on December 22, 2005, without any ruling in his favor by the courts. So that he could benefit from the ruling, the Tenth Court, after briefing from the parties, issued its mandate a day early on December 20, 2005. Respondent was released on that date with the qualification that if Petitioner's Petition for Rehearing and Request for En Banc Consideration were granted, the mandate would be recalled and a new one would be issued. While the Petition for Rehearing was pending, the Tenth Circuit ordered further briefing on the issue of whether the case had been mooted by Respondent's early release. Both Petitioner and Respondent argued the case was not moot as Respondent still had two days of his sentence to serve should the decision be reversed on rehearing. The Order denying rehearing made no further mention of the mootness issue.

STATEMENT OF FACTS

In a prison disciplinary proceeding on November 2, 2001, Respondent received a misconduct conviction for attempting to obtain money by false pretenses. *Wilson*, 430

F.3d at 1116. His punishment, 30 days in disciplinary segregation and the revocation of 180 earned credits, was suspended for 90 days. *Id.* When 90 days passed with no further infraction, Respondent's punishment was never imposed. *Id.* However, pursuant to prison regulations and State statute Respondent was mandatorily demoted from Earned Credit Level 4, where he earned 44 credits per month toward early release, to Earned Credit Level 1, where he earned no credits. *Id.* This demotion was mandatory due to the misconduct conviction. *Id.* (citing Okla. DOC Policy OP-060107(I)(C)(2)(a)(5)). After a month at Level 1, Respondent was reclassified to Level 2, earning 22 credits per month, where, according to prison regulations, he was required to remain for two years following the misconduct conviction. *Id.* at 1115-16. He remained at Level 2 until October 2002, when he committed another misconduct not at issue in this case, and was again mandatorily demoted to Level 1. *Id.* at 1116.

REASONS FOR GRANTING THE WRIT

This Court's review of this matter is necessary because the decision of the Tenth Circuit to confer on Respondent a liberty interest in the earned credit level to which he is assigned conflicts with this Court's decision in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). The Tenth Circuit's decision is likewise in sharp contrast with the decision of the United States Court of Appeals for the Fifth Circuit on the same important matter in *Malchi v. Thaler*, 211 F.3d 953 (5th Cir. 2000), and this Court should resolve this split among the circuits.

I. THE DECISION OF THE TENTH CIRCUIT THAT A STATE INMATE HAS A LIBERTY INTEREST IN REMAINING AT A PARTICULAR EARNED CREDIT LEVEL CONFLICTS WITH THIS COURT'S DECISION IN *SANDIN V. CONNER*.

In his appeal to the Tenth Circuit, Respondent claimed he was denied due process when he was demoted to Earned Credit Level 1 following his misconduct conviction. Relying on *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), and the Tenth Circuit's earlier decision in *Gamble v. Calbone*, 375 F.3d 1021 (10th Cir. 2004),[1] Respondent argued his automatic demotion as a result of the misconduct conviction inevitably affected the length of his sentence and thus gave him a liberty interest in the disciplinary proceeding. He further argued that because his misconduct conviction was not supported by sufficient evidence, he had been denied due process. The Tenth Circuit agreed with Respondent on both matters.

This Court has repeatedly counseled against undue interference by a federal habeas court into the administration of State prisons. In *Sandin*, 515 U.S. at 482, 115 S.Ct.

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[1] In *Gamble*, the Tenth Circuit decided an appeal brought by two prisoners in the same prison as Respondent, convicted of the same offense. The Tenth Circuit reversed the convictions of those two inmates based on the lack of evidence supporting the misconduct convictions. *Id.* at 1031-32. In *Gamble*, however, each of the inmates had lost previously awarded earned credits in which they had a recognized liberty interest, and their convictions, unsupported by the evidence, violated their due process rights. *Id.* at 1025, 1031-32. Respondent in this case relied on *Gamble* because the Tenth Circuit ordered the restoration of the inmates' credit-earning status as part of the remedy. *Wilson*, 430 F.3d at 1120 (citing *Gamble*, 375 F.3d at 1031-32).

at 2299, this Court noted that its previous methodology in determining how much, if any, process a prison inmate is due in disciplinary matters had "led to the involvement of federal courts in the day-to-day management of prisons," when in fact "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." Even prior to *Sandin*, this Court acknowledged that

> [r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner v. Safley, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987) (citing *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974)). Instead of affording "appropriate deference and flexibility" to the prison authorities in this case, the Tenth Circuit's decision has involved the federal court in the "day-to-day management of prisons . . . with little offsetting benefit to anyone." *Sandin*, 515 U.S. at 482, 115 S.Ct. at 2299.

In its opinion reversing the judgment of the United States District Court for the Western District of Oklahoma, the Tenth Circuit noted that Respondent's reclassification resulting from his misconduct conviction was

mandatory. *Wilson v. Jones*, 430 F.3d 1113, 1120 (10th Cir. 2005). The Circuit Court therefore found the duration of his confinement was inevitably affected, giving him a liberty interest in the disciplinary hearing. *Id.* As a result of finding a liberty interest, the Tenth Circuit proceeded to review Respondent's misconduct conviction to determine if he had received all the process he was due. *Id.* at 1123. Finding the evidence insufficient to support the misconduct conviction, the Tenth Circuit ordered restoration of Respondent's former status in earning credits. *Id.* at 1123-24.

In conferring on Respondent a liberty interest in the mere opportunity to earn credits, the Tenth Circuit has rendered a decision which is contrary to this Court's decision in *Sandin* in two ways. First, contrary to *Sandin*, the Circuit Court focused its inquiry on the mandatory language found in the prison regulations in finding Respondent's misconduct conviction inevitably affected the duration of his sentence. Second, the Circuit Court's decision reflects a misunderstanding of Oklahoma's earned credit level scheme, as the misconduct did not inevitably affect the length of Respondent's sentence.

A. The Tenth Circuit's decision has violated *Sandin* by parsing the language of the regulations to find a State-created liberty interest.

In finding Respondent had a liberty interest in this case, the Tenth Circuit used an approach which focused on the language of the prison regulations, which approach was abandoned by this Court in *Sandin*. The Circuit Court noted that the language of the prison regulations mandated Respondent's demotion in credit levels as a result of

his misconduct conviction, and prohibited him from being considered for any level higher than Level 2 for a period of two years. *Wilson*, 430 F.3d at 1120. The Tenth Circuit concluded the mandatory language stripped prison officials of any discretion in this instance and thus created a liberty interest in Respondent's expectation to remain at a certain level. *Id.*

The Tenth Circuit's decision in this case is very similar to the decision of the United States Court of Appeals for the Ninth Circuit which was overturned by this Court in *Sandin*, where an inmate claimed a liberty interest in a right to be free from disciplinary segregation. At issue in *Sandin* was a Hawaii prison regulation which instructed "the committee to find guilt when a charge of misconduct is supported by substantial evidence." *Sandin*, 515 U.S. at 476-77, 115 S.Ct. at 2296. From this language the Ninth Circuit reasoned "that the committee's duty to find guilt was nondiscretionary", drawing "a negative inference that the committee may not impose segregation if it does not find substantial evidence of misconduct." *Id.*, 515 U.S. at 477, 115 S.Ct. at 2297. As such, the Ninth Circuit found the petitioner had a liberty interest in remaining free from disciplinary segregation and was therefore entitled to due process in the committee's decision to punish him in that manner. *Id.*, 515 U.S. at 476-77, 115 S.Ct. at 2296-97.

The Ninth Circuit's decision prompted this Court in *Sandin* to revisit its prior cases addressing State-created liberty interests in shortened prison sentences, including *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), and *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). At issue in *Wolff* was a Nebraska statute "that bestowed mandatory sentence

reductions for good behavior . . . revocable only for 'flagrant or serious misconduct.'" *Sandin*, 515 U.S. at 477, 115 S.Ct. at 2297 (quoting *Wolff*, 418 U.S. at 545-46, 94 S.Ct. at 2969-70, n. 5-6). Because the earned credits in *Wolff* were revocable only upon a finding that the inmate was guilty of serious misconduct, the Court found the statute had created a liberty interest as the inmate's interest in a shortened sentence was one of "'real substance'". *Sandin*, 515 U.S. at 478, 115 S.Ct. at 2297 (quoting *Wolff*, 418 U.S. at 557, 94 S.Ct. at 2975).

The *Sandin* Court went on to review its decision in *Hewitt*, in which the Court had adopted a "mandatory language" approach to determine whether prison regulations conferred any liberty interest on inmates. *Sandin*, 515 U.S. at 480, 115 S.Ct. at 2298 (citing *Hewitt*, 459 U.S. at 471-72, 103 S.Ct. at 871). The *Sandin* Court noted that, instead of focusing on whether the State had created an interest of "real substance" as in *Wolff*, the decision in *Hewitt* focused on whether the guidelines at issue "used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.'" *Sandin*, 515 U.S. at 480, 115 S.Ct. at 2298 (quoting *Hewitt*, 459 U.S. at 471-72, 103 S.Ct. at 871).

The *Sandin* Court abandoned such an approach in determining whether prison regulations bestowed inmates with any State-created liberty interests, finding that "the search for a negative implication from mandatory language in prison regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." *Sandin*, 515 U.S. at 483, 115 S.Ct. at

2300.[2] The Court went on to reiterate that while States may in certain circumstances create liberty interests protected by due process, "these interests will be generally limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or "where the State's action will inevitably affect the duration of his sentence." *Id.*, 515 U.S. at 483-84, 487, 115 S.Ct. at 2300, 2302. *See also Wolff*, 418 U.S. at 557, 94 S.Ct. at 2975 ("[T]he Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison".). It is the latter situation which the Tenth Circuit referenced to find a liberty interest in this case; however, the Circuit Court's finding is in reality based on the mandatory language of the regulations, and is therefore improper, as such a finding is in violation of *Sandin*.

The Tenth Circuit purported to base its finding of a liberty interest on the nature of the deprivation by employing language from *Sandin* that "the misconduct conviction infringed a liberty interest because it reduced his credit earning class in a manner that 'inevitably affect[ed] the duration of his sentence.'" *Wilson*, 430 F.3d at 1120 (quoting *Sandin*, 515 U.S. at 487, 115 S.Ct. at 2302). However, the Tenth Circuit's application of this standard focused almost entirely on the language of the

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[2] This Court recently reaffirmed the abandonment of the mandatory language approach in *Wilkinson v. Austin*, 545 U.S. 209, ___, 125 S.Ct. 2384, 2393-94, 162 L.Ed.2d 174 (2005) ("In *Sandin*, we criticized this methodology as creating a disincentive for States to promulgate procedures for prison management, and as involving federal courts in the day-to-day management of prisons.... For these reasons, we abrogated the methodology of parsing the language of particular regulations.").

regulations at issue, and is thus contrary to this Court's abandonment of such an approach in *Sandin*, 515 U.S. at 483-84, 115 S.Ct. at 2300. This conclusion is made fully apparent below, wherein Petitioner establishes that, in light of *Sandin* and the regulations at issue, Respondent's misconduct conviction did not inevitably affect the duration of his sentence. Contrary to the Tenth Circuit's decision, *Sandin* requires this Court to find Respondent has no liberty interest in the opportunity to earn credits.

B. The Tenth Circuit's finding that Respondent lost more than an opportunity to earn credits misinterprets the way inmates in Oklahoma earn credits.

The Tenth Circuit in this case concluded that Respondent's misconduct conviction "'inevitably affect[ed] the duration of his sentence'" and therefore triggered the protections of the Due Process Clause. *Wilson*, 430 F.3d at 1120 (quoting *Sandin*, 515 U.S. at 487, 115 S.Ct. at 2302). In so finding, the Circuit Court cited cases wherein other courts found that a transfer to another facility, a refusal to participate in a program or a loss of a prison job, and the resulting loss of opportunity to earn credits, did not implicate a protected liberty interest. *Wilson*, 430 F.3d at 1119 (citing *Zimmerman v. Tribble*, 226 F.3d 568, 571-72 (7th Cir. 2000); *Higgason v. Farley*, 83 F.3d 807, 809-10 (7th Cir. 1996); *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995)). The Tenth Circuit distinguished the instant case by finding Respondent "lost more than a mere opportunity to earn credits upon satisfactory completion of a job or program in the future." *Id.* at 1120. This statement stems from a misunderstanding of the way credits are earned by Oklahoma inmates, and this misunderstanding

is evidenced by the Circuit Court's citation to *Montgomery v. Anderson*, 262 F.3d 641 (7th Cir. 2001).

In *Montgomery*, 262 F.3d at 645, the United States Court of Appeals for the Seventh Circuit found the Indiana statute in question afforded inmates a liberty interest in their earned credit level. The Tenth Circuit noted with approval language from *Montgomery* that the statute "required prisoners to be assigned to a credit-earning class unless certain events occurred, thus 'curtail[ing] administrators' discretion and . . . giv[ing] prisoners more than a subjective hope of receiving day-for-day credit.'" *Wilson*, 430 F.3d at 1121 (quoting *Montgomery*, 262 F.3d at 645) (emphasis added). The statute at issue in *Montgomery*, however, is instantly distinguishable from the regulations in the instant case. As acknowledged by the Circuit Court, the Indiana inmates in *Montgomery* had a right to remain at a certain level in the absence of certain events. *Montgomery*, 262 F.3d at 645. The regulations at issue in this case, however, create no such right for Oklahoma inmates.

Petitioner acknowledges that the Tenth Circuit's initial discussion of Oklahoma's earned credit scheme is correct:

> Prisoners are automatically assigned to level two upon reception into the prison system. Okla. DOC Policy OP-060107(I)(C)(2)(b). Ordinarily, an adjustment review committee of at least three prison officials reviews an inmate's classification at least once every four months to determine whether a change in classification is necessary because a prisoner has met (or failed to meet) certain statutory criteria. Okla. Stat. tit. 57, § 138(F). The statutory classification system provides for classification between levels one and four

> depending on the factors listed in the statute, some of which are objective, such as the length of incarceration, and some of which require an exercise of prison officials' subjective judgment and discretion, such as whether a prisoner's hygiene has been "outstanding" or merely "good." *See id.* § 138(D)(3)&(4). Once a prisoner is classified at a particular level, the prisoner is statutorily entitled to earn a specified number of credits. *Id.*

Wilson, 430 F.3d at 1116. What the above recitation implies, but does not explicitly acknowledge, is that which the Oklahoma Court of Criminal Appeals has long recognized: that while Oklahoma confers on an inmate the right to earn the number of credits which corresponds to the level to which he is assigned, he has no right or expectation to be assigned to any particular level, or to remain at a particular level once assigned. *Canady v. Reynolds*, 880 P.2d 391, 397 (Okla. Crim. App. 1994) (acknowledging the discretion inherent in Section 138); *Tomlin v. State ex rel. Dep't of Corrections*, 814 P.2d 154, 156 (Okla. Crim. App. 1991) ("the award of earned time credits is based upon the Department of Corrections' assessment of an inmate's compliance with guidelines and is thus discretionary").

Unlike the situation in *Montgomery*, where, once assigned to a particular level, inmates cannot be demoted in the absence of certain circumstances, Oklahoma inmates must maintain their eligibility for a certain level and neither statute nor prison regulations confer any expectation that they will remain at that level *unless* a specified event occurs. *Canady*, 880 P.2d at 397; *Tomlin*, 814 P.2d at 156. Instead, because prison officials retain such wide discretion in the up and down classification of inmates among the credit levels, Oklahoma inmates have

nothing more than a subjective hope of remaining at any certain level once assigned.

As used in Section 138 and the corresponding regulations, the term mandatory does not mean it was mandatory that Respondent remain at a certain level in the absence of some underlying event. Based on the discretionary nature of assignment to a level, Respondent had no legitimate expectation of remaining at a particular level once assigned. Okla. Stat. tit. 57, § 138(D)(3), (4) (2001). The fact that Respondent's demotion was mandatory in this instance does nothing to solidify his subjective hope of remaining at a certain level into a constitutionally protected interest. Thus, contrary to the Tenth Circuit's finding, the only thing Respondent lost with his demotion was the mere opportunity to earn credits upon his continued eligibility to remain at a higher credit level, which other circuits have repeatedly found does not confer a liberty interest. *See Zimmerman*, 226 F.3d at 571-72; *Higgason*, 83 F.3d at 809-10; *Bulger*, 65 F.3d at 50. Any other conclusion, as shown in Sub-Proposition D, *infra*, could have serious repercussions.

C. The Tenth Circuit's finding that Respondent's misconduct conviction inevitably affected the duration of his sentence is contrary to *Sandin* because it incorrectly views the effects of the conviction in hindsight.

In finding Respondent's demotion to Level 1 inevitably affected the length of his sentence, the Tenth Circuit looked at the misconduct conviction from the improper viewpoint. Whether an action inevitably affects the duration of confinement must be viewed not in hindsight, as

Petitioner asserts the Circuit Court did, but from the point in time when the action is taken. This is the point of view this Court took in *Sandin*, where it considered whether the inmate's misconduct conviction would inevitably affect his chances of parole in the future. *Sandin*, 515 U.S. at 487, 115 S.Ct. at 2302. Considering Respondent's demotion from this proper point of view, just as in *Sandin*, it is entirely speculative whether the misconduct conviction and its resulting demotion in earned credit levels would inevitably affect his sentence; therefore, the demotion is too attenuated to state a liberty interest.

By focusing on the mandatory language of the regulation, the Circuit Court ignored the many other discretionary decisions that could have been made at that time based on any number of factors which could have resulted in Respondent's demotion to Level 1 absent any finding of misconduct on his part. Okla. Stat. tit. 57, § 138(D)(3), (4). Because of the wide discretion afforded prison employees in classifying inmates among credit levels, it is impossible to know whether Respondent would have maintained his eligibility to remain at Level 4 or even Level 3 in the absence of this misconduct. The only certainty in this case is that Respondent remained eligible to earn credits at Level 2 from the month following his November 2001 misconduct until he received another misconduct not at issue in October 2002. Any statement beyond that regarding how many credits Respondent could have earned in those eleven months is pure speculation, just as speculative as the effect of the *Sandin* petitioner's misconduct on his chances of parole which this Court found "simply too attenuated to invoke the procedural guarantees of the Due

Process Clause." *Sandin*, 515 U.S. at 487, 115 S.Ct. at 2302.[3]

D. The Tenth Circuit's decision may result in serious repercussions if left unchecked.

Should the Tenth Circuit's decision stand, Petitioner asserts it may have the effect of conferring on inmates a liberty interest where none has as yet been found, based on the language of prison regulations. In addition to contradicting *Sandin* in the manner discussed above, this effect would also run afoul of this Court's instruction that prison regulations are "not designed to confer rights on inmates" and "are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion vested by the State in the warden, and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents." *Sandin*, 515 U.S. at 482, 115 S.Ct. at 2299. *See also Town of Castle Rock, Colo. v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796, 2808, 162 L.Ed.2d 658 (2005) ("Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people.") (citing *Sandin*, 515 U.S. at 482, 115 S.Ct. at 2299).

The foreseeable expansion of the Tenth Circuit's decision will result in requiring a hearing which complies with due process in every situation in which an inmate is

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[3] As shown in Part II, *infra*, the Tenth Circuit's finding that the disciplinary action inevitably affected the length of Respondent's sentence likewise presents a split among the circuits, which this Court should take the opportunity to resolve.

reclassified to a different earned credit level. Petitioner acknowledges that the Circuit Court's decision attempts to prevent such a result with the statement that Respondent "lost more than a mere opportunity to earn credits upon satisfactory completion of a job or program in the future." *Wilson*, 430 F.3d at 1121. Such a distinction will be one without a difference, however, when *Wilson* is taken to its logical conclusion. The reality is that each of the situations cited by the Tenth Circuit, as well as Respondent's situation, involves some triggering event, usually a finding by a prison employee, which results in an inmate's demotion. The result that a hearing could eventually be required with any reclassification is foreseeable, and strips the "state officials trying to manage a volatile environment" of the "appropriate deference and flexibility" this Court directed federal courts to afford them. *Sandin*, 515 U.S. at 482, 115 S.Ct. at 2299 (citing *Wolff*, 418 U.S. at 561-63, 94 S.Ct. at 2977-78). Petitioner asserts that the Tenth Circuit's decision reflects exactly the type of "involvement of federal courts in the day-to-day management of prisons" which "creates disincentives for States to codify prison management procedures in the interest of uniform treatment" about which this Court warned. *Id.*

II. THE TENTH CIRCUIT'S DECISION REPRESENTS A SPLIT AMONG THE CIRCUITS AS IT CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT ON THE SAME IMPORTANT MATTER.

In addition to contradicting *Sandin* in the manner discussed above, the Tenth Circuit's finding that the demotion inevitably affected the duration of Respondent's sentence likewise represents a split among the circuit courts, as it conflicts with the Fifth Circuit's decision in

Malchi v. Thaler, 211 F.3d 953 (5th Cir. 2000), on the same important matter.

In *Malchi*, a Texas State inmate was convicted of a misconduct in a prison disciplinary hearing and was punished by a "30-day loss of commissary privileges, 30-day cell restriction and the reduction of his good-time-earning status". *Id.* at 955. The federal district court ruled in favor of the inmate based on insufficient evidence to support his misconduct conviction, and ordered the restoration of the petitioner's "time-earning status and all lost good time resulting from the disciplinary conviction". *Id.* at 956. On appeal, the warden noted that the inmate's punishment did not include revocation of any previously earned credits, but only reduced his status in earning such credits, which delayed his projected release date on mandatory supervision for more than six months. *Id.* at 958. The warden also argued that the inmate could have "without reference to this or any other disciplinary action, fail[ed] to earn the full measure of good-time credit available at [his former] status", making his projected release date too speculative. *Id.* The Fifth Circuit in *Malchi* noted that an inmate's "[a]ssignment to a particular time-earning status depends on a wide variety of factors", just as it does in Oklahoma. *Id.* at 959. In sharp contrast to the Tenth Circuit's decision in *Wilson*, after discussing *Sandin*, the Fifth Circuit reversed the judgment of the federal district court, holding that while the inmate's status in earning credits "is less attenuated from his mandatory release than release on parole, we nonetheless conclude that the timing of Malchi's release is too speculative to afford him a constitutionally cognizable claim to the 'right' to a particular time-earning status, which the Texas legislature has specifically denied creating." *Id.*

The Tenth Circuit's conclusion in *Wilson* directly conflicts with the Fifth Circuit's decision in *Malchi* on a materially indistinguishable factual situation. Moreover, both circuit courts reached their decisions regarding the existence of a liberty interest by relying on this Court's decision in *Sandin*. *Wilson*, 430 F.3d at 1120; *Malchi*, 211 F.3d at 959. Because these two circuit courts have relied on the same decision of this Court to reach opposite conclusions on the same important matter, this Court should take this opportunity to resolve this split among the circuits and find that a State prison inmate has no liberty interest in the particular credit level to which he is assigned.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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430 F.3d 1113

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LARRY WILSON, Petitioner-Appellant, v. JUSTIN JONES, Director of the Oklahoma Department of Corrections; ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents-Appellees.*	No. 02-6384

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-02-0301-F)

(Filed December 7, 2005)

Vicki Mandell-King, Assistant Federal Public Defender (Raymond P. Moore, Federal Public Defender, and Howard A. Pincus, Assistant Federal Public Defender, on the briefs), for Petitioner-Appellant.

Larry Wilson filed a brief *pro se*.

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* Pursuant to FED.R.APP.P. 43(c)(2), Justin Jones, Ron Ward's successor at the Oklahoma Department of Corrections, has been automatically substituted as a party in this appeal.

Keeley L. Harris, Assistant Attorney General (W.A. Drew Edmondson, Attorney General of Oklahoma, and Kellye Bates, Assistant Attorney General, with her on the briefs), for Respondents-Appellees.

Before **HENRY**, **HOLLOWAY**, and **LUCERO**, Circuit Judges.

HENRY, Circuit Judge.

Larry Wilson, an Oklahoma State inmate incarcerated at the Great Plains Correctional Facility, appeals the district court's denial of his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Mr. Wilson alleges that his due process rights were violated when a Class X misconduct conviction caused him to be demoted from a credit-earning prisoner to a non-credit-earning prisoner because no evidence supported the misconduct conviction. We agree with Mr. Wilson, and reverse and remand for issuance of the writ.

I. BACKGROUND

Mr. Wilson's problem began with what seems an innocuous or even laudable action: he attempted to use his mandatory savings account to pay for the costs associated with copying the court documents he needed to pursue a post-conviction proceeding. Because of that attempt, he was charged with violating Oklahoma law, subjected to prison disciplinary proceedings, and convicted of a Class X misconduct. The Class X misconduct conviction triggered

two automatic and mandatory consequences. First, Mr. Wilson was demoted from a class-level-four prisoner, earning 44 credits each month toward early release, to a class-level-one prisoner, ineligible to earn any credits. Second, the Class X misconduct made him ineligible for promotion beyond level two, where he could earn only 22 credits each month, for a period of two years. To understand fully the misconduct conviction and its effects on Mr. Wilson, first we examine the Oklahoma law he was accused of violating, the details of the misconduct conviction and its consequences, and how those consequences led to Mr. Wilson's petition in this court.

A. Oklahoma Law Regarding Use of Mandatory Savings Accounts

Prisoners in Oklahoma are required to keep a mandatory savings account, in which they must deposit twenty percent of the wages they earn from prison employment. They may only access the account to pay "fees or costs in filing a civil or criminal action as defined in Section 151 *et seq.* of Title 28 of the Oklahoma Statutes." OKLA. STAT. tit. 57, § 549(A)(5) (2004). Section 151(A), in turn, provides that district court clerks shall "charge and collect the fees imposed by this title, [and] fines, costs and assessments imposed by the district court or appellant courts." OKLA. STAT. tit. 28, § 151(A) (2004). Our court has recently concluded that Oklahoma inmates can use mandatory savings accounts to pay any fee, fine, cost or assessment imposed by any section of Title 28 of the Oklahoma Statutes. Included under Title 28 and payable by a mandatory savings account are "photocopy charges imposed by a court clerk for obtaining official records and transcripts." *Gamble v.*

Calbone, 375 F.3d 1021, 1029 (10th Cir. 2004) (citing OKLA. STAT. tit. 28, § 31).

Despite the broad sweep of section 151(A) and the inclusion of copying costs in Title 28, when Mr. Wilson followed the usual procedures and requested, in writing from the proper prison authorities, the release of $170 from his mandatory savings account to pay for copies of proceedings in his criminal conviction for use in his post-conviction appeal, the private prison officials charged him with a Class X misconduct. Any violation of city, state, or federal law constitutes a Class X misconduct, "the most serious class of prison misconduct." *Gamble,* 375 F.3d at 1025 n.4; Okla. Dep't of Corr. (DOC) Policy OP-060125, Attachment A. Here, prison officials accused Mr. Wilson of violating OKLA. STAT. tit. 21, § 1541.1, which prohibits obtaining money under false pretenses. The only evidence for the charge was the written form Mr. Wilson had submitted to prison officials. On the form, he requested payment from his account "to attain transcripts and court documents from Murray County Court Clerk." Rec. vol. I, doc. 2, Ex. B (Request to Staff, Oct. 9, 2001).

B. Misconduct Conviction and its Consequences

After a hearing, prison officials determined that Mr. Wilson had violated section 1541.1 and punished him by (1) revoking 180 of his earned credits and (2) imposing thirty days' disciplinary segregation. For reasons unclear on this record, Mr. Wilson's punishments were immediately suspended for 90 days. The State represented in its supplemental brief that, because the 90 days expired without incident, "the 180 credits can never be revoked." Aples' Supl. Br. at 3 (Mar. 14, 2005).

Pursuant to DOC policy, any Class X misconduct conviction triggers certain "*[m]andatory* sanctions [that] cannot be suspended." Okla. DOC Policy OP-060125(IV)(E) (emphasis added). Here, the Class X misconduct conviction resulted in Mr. Wilson's mandatory reclassification from a class-level-four prisoner to a class-level-one prisoner, as required by the Oklahoma DOC's prisoner classification procedures. Okla. DOC Policy OP-060107(I)(C)(2)(a)(5) (stating that "[l]evel I assignment is mandatory . . . [u]pon conviction for any misconduct, effective the date of the misconduct"). While a class-level-four prisoner, Mr. Wilson automatically earned 44 credits per month toward early release, but as a class-level-one prisoner, Mr. Wilson was statutorily ineligible to earn any credits. OKLA. STAT. tit. 57, § 138(D)(2).

Mr. Wilson was required to spend thirty days at level one. Okla. DOC Policy OP-060107(I)(C)(6). After that time, Mr. Wilson was promoted to level two, where he remained for one year until he received another misconduct conviction. Rec. vol. 1, doc. 10, Ex. A (Aples' Resp. to Pet., filed May 7, 2002); Aples' Supl. Br., Ex. D.

Prisoners are automatically assigned to level two upon reception into the prison system. Okla. DOC Policy OP-060107(I)(C)(2)(b). Ordinarily, an adjustment review committee of at least three prison officials reviews an inmate's classification at least once every four months to determine whether a change in classification is necessary because a prisoner has met (or failed to meet) certain statutory criteria. OKLA. STAT. tit. 57, § 138(F). The statutory classification system provides for classification between levels one and four depending on the factors listed in the statute, some of which are objective, such as the length of incarceration, and some of which require an

exercise of prison officials' subjective judgment and discretion, such as whether a prisoner's hygiene has been "outstanding" or merely "good." *See id.* § 138(D)(3) & (4). Once a prisoner is classified at a particular level, the prisoner is statutorily entitled to earn a specified number of credits. *Id.* Regardless of whether Mr. Wilson continued to meet the statutory criteria for promotion to levels three or four, the Class X conviction caused Mr. Wilson to become ineligible for promotion beyond class level two for a period of two years. Okla. DOC Policy OP-060107(I)(C)(2)(c) & (d); Okla. DOC Policy OP-060103(a)(M).

C. Procedural History

As a result of the misconduct conviction and its automatic, mandatory consequences, Mr. Wilson filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2241 to challenge the misconduct conviction. He contends that the misconduct conviction violated his due process rights because it was unsupported by evidence. The magistrate judge recommended that Mr. Wilson's petition be denied because (1) Mr. Wilson never actually lost any earned credits, and (2) the demotion in class level did not implicate a constitutionally protected "liberty interest sufficient to invoke the procedural protections of the due process clause." Rec. vol. I, doc. 12, at 4 (Rep. & Rec., filed May 7, 2002). The district court adopted the magistrate judge's recommendation without further opinion. Mr. Wilson then filed an application for a certificate of appealability (COA). *See* 28 U.S.C. § 2253. In 2003, we granted Mr. Wilson's application for a COA on three issues: (1) whether Mr. Wilson properly exhausted his state-court remedies; (2) whether his reclassification deprived him of a constitutionally protected liberty interest; and

(3) if so, whether the reclassification violated his due process rights because there was insufficient evidence to prove his alleged misconduct.

Subsequent to the district court's decision, this court, in *Gamble v. Calbone,* granted habeas relief to two prisoners from the same prison as Mr. Wilson, who had also been convicted of the same Class X misconduct based on the same "evidence" as Mr. Wilson. 375 F.3d 1021 (10th Cir. 2004). We ordered that the State provide additional briefing in light of *Gamble* on the issue of whether Mr. Wilson's suspended punishment could ever be reinstated. After receipt of the supplemental brief, we ordered oral argument and the appointment of a federal public defender to represent Mr. Wilson.

II. DISCUSSION

The Fourteenth Amendment prohibits states from depriving citizens of liberty without due process of law. Although their due process rights are defined more narrowly, that guarantee applies to prisoners as well. Thus, in *Sandin v. Conner,* 515 U.S. 472, 484, 487 (1995), the Supreme Court concluded that a prisoner is entitled to due process before he is subjected to conditions that "impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," or disciplinary actions that "inevitably affect the duration of his sentence." *See also Talley v. Hesse,* 91 F.3d 1411, 1414 (10th Cir. 1996) (discussing these two ways of establishing a liberty interest under *Sandin*).

As a general rule, before officials may take actions that affect these protected liberty interests, they must afford a prisoner (a) advance written notice of the charges;

(b) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (c) a written statement by the factfinder of the evidence relied upon on and the reasons for the disciplinary action. *Superintendent, Mass. Corr. Inst. at Walpole v. Hill,* 472 U.S. 445, 454 (1985). In addition, the decision must be supported by some evidence. *Id.*

In this appeal, Mr. Wilson contends that: (a) requiring state-court exhaustion in this type of habeas appeal is futile; (b) his Class X misconduct conviction inevitably affected the length of his sentence and thus infringed a liberty interest; and (c) no evidence supported that conviction. As a result, he concludes, prison officials violated his due process rights. Each of these issues involves questions of law, and our review is thus de novo. *See Gamble,* 375 F.3d at 1027 (sufficiency of the evidence); *Miller v. Menghini,* 213 F.3d 1244, 1246 (10th Cir. 2000) (exhaustion); *Harper v. Young,* 64 F.3d 563, 566 (10th Cir. 1995) (existence of a liberty interest). For the reasons set forth below, we are persuaded by Mr. Wilson's arguments as to all three issues.

A. Exhaustion of Remedies

A habeas petitioner seeking relief under 28 U.S.C. § 2241 is generally required to exhaust state remedies. *Montez v. McKinna,* 208 F.3d 862, 865 (10th Cir. 2000). However, that requirement is not applicable when the prisoner has no adequate remedy such that exhaustion would be futile. *Gamble,* 375 F.3d at 1026.

In *Gamble,* we explained that a prisoner "seeking speedier . . . release due to alleged errors in calculating

earned or good-time credits does not have an adequate habeas remedy under Oklahoma law, and that requiring state exhaustion would be futile." *Id.* at 1026 (citing *Wallace v. Cody,* 951 F.2d 1170, 1172 (10th Cir. 1991)). Moreover, prisoners in Oklahoma cannot file a direct judicial appeal to the state courts challenging a disciplinary board decision regarding their earned-credit status. *Id.* (citing *Canady v. Reynolds,* 880 P.2d 391, 396-97 & n.4 (Okla. Crim. App. 1994)). As a result, we concluded that the prisoners there were not required to seek relief in state court, and we therefore proceeded to the merits of their due process claims.

Here, the State conceded during oral argument that Mr. Wilson has exhausted his administrative remedies, and in its briefs, argued only that Mr. Wilson had not exhausted his state-court remedies. Because of our holding in *Gamble* that requiring state exhaustion is "futile," Mr. Wilson has satisfied all exhaustion requirements associated with this type of habeas claim and his petition is properly before this court. Therefore, we proceed to the merits of his due process claim.

B. Liberty Interest

Invoking *Sandin,* Mr. Wilson argues that his Class X misconduct conviction "inevitably affect[ed] the duration of [his] sentence," 515 U.S. at 487, and thus implicated a liberty interest. He reasons that the conviction mandatorily reduced the rate at which he earned good time credits, and argues that this impact was sufficient for this court to grant relief in *Gamble.* In response, the State contends that despite Mr. Wilson's improper Class X misconduct conviction, prison officials retained discretion to change

his classification – and the resulting rate at which he would earn good time credits. According to the State, that discretion demonstrates that the effect of the Class X misconduct conviction was not inevitable and that, as a result, no liberty interest was implicated. Resolution of this issue requires an examination of *Sandin,* subsequent decisions applying it, and other Tenth Circuit due process cases.

1. Sandin

Sandin involved an inmate from Hawaii's state prison who alleged that two misconduct convictions violated his due process rights. 515 U.S. at 475-76. He was convicted of one "high misconduct" and one "low moderate misconduct," and the high misconduct charge was later reversed and expunged from his record. *Id.* at 475-76, 487 n.10. The Court noted that the Hawaii parole board was not *required* to deny parole as a result of the misconduct charges: "even though misconduct is by regulation a relevant consideration, . . . [t]he decision to release a prisoner rests on a myriad of considerations." *Id.* at 487. Therefore, the Court reasoned, the misconduct conviction did not inevitably affect the duration of the prisoner's sentence: "[t]he chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause." *Id.* The Court implied that if the parole board had been required to take particular actions as a result of the misconduct charge, its decision might have been different: "we note that Hawaii expunged [the inmate's] record with respect to the 'high misconduct' charge, so he personally has no chance of receiving a delayed release as a direct result of that allegation." *Id.* at 487 n.10.

As the Fifth Circuit has noted, "a host of administrative or disciplinary decisions made by prison authorities might somehow affect the timing of a prisoner's release." *See Luken v. Scott,* 71 F.3d 192, 193 (5th Cir. 1995). However, many of these decisions do not trigger the protections of the due process clause. For example, applying *Sandin,* a number of courts have concluded that a decision that a particular prisoner is ineligible to participate in certain programs does not implicate a protected liberty interest, even though participation in those programs would have provided him with an opportunity to earn good time credits at a higher rate. In these courts' view, the effect of the challenged decisions on the length of the prisoner's sentence is "too attenuated" to implicate a liberty interest. *See, e.g., Zimmerman v. Tribble,* 226 F.3d 568, 571-72 (7th Cir. 2000) (holding that a prisoner's transfer to a facility that did not offer vocational training and substance abuse programs did not implicate a liberty interest, even though the transfer resulting in the loss of an opportunity to earn good time credits); *Higgason v. Farley,* 83 F.3d 807, 809-10 (7th Cir. 1996) (holding that a prisoner's placement in segregation, which resulted in the loss of access to educational programs and the resulting opportunity to earn good time credits did not implicate liberty interest, reasoning that "even if [the prisoner] has been given the opportunity, it was not inevitable that he would complete an educational program and earn good time credits"); *Bulger v. U.S. Bureau of Prisons,* 65 F.3d 48, 50 (5th Cir. 1995) (holding that the loss of a prison job did not implicate a prisoner's liberty interest even though the prisoner lost the ability to automatically accrue good-time credits).

2. Tenth Circuit Decisions

This circuit has indicated that the connection between a disciplinary decision and the length of a prisoner's sentence may be sufficient to establish a liberty interest when the prisoner establishes that the decision was the only factor that lengthened the sentence. *See Reed v. McKune,* 298 F.3d 946, 954 (10th Cir. 2002) (noting that, under *Sandin,* "deprivations of process impacting on parole decisions may be 'too attenuated to invoke the procedural guarantees of the Due Process Clause,'" but that "[petitioner's] claim that he is being denied parole *solely* on the basis of his failure to participate in [a treatment program] is not so attenuated" and that, as a result, the petitioner "might, therefore, potentially state a due process violation") (quoting *Sandin,* 515 U.S. at 487) (emphasis added).

We have also held that there are circumstances in which the reduction of the rate at which a prisoner earns good time credits may trigger due process protections. For example, in *Chambers v. Colorado Dep't of Corrections,* 205 F.3d 1237, 1242 (10th. Cir. 2000), Colorado prison officials classified the petitioner as a sex offender for five years but then reduced the rate at which he earned good time credits after he refused to participate in a treatment program. We concluded that "[prison officials] provided [the petitioner] [with] a liberty interest in the consequences of the mandatory label which they then arbitrarily removed without affording him any opportunity to a hearing to challenge the label." *Id.* at 1243 (emphasis deleted). We characterized "the consequences of the [sex offender] label," (i.e., the opportunity to earn good time credits at a higher rate) as "a benefit that cannot be taken away without some process." *Id.*

In *Gamble* we found due process protections implicated in circumstances closely resembling the facts here. The petitioners, both inmates from the Great Plains Correctional Facility, had attempted to use their mandatory savings accounts to pay for costs associated with the appeals of their criminal convictions. *Gamble,* 375 F.3d at 1032. Like Mr. Wilson, the petitioners had been convicted of a Class X law violation, "[o]btaining money under false pretenses," and the only evidence against each of them was a copy of the inmates' check requests. *See id.* at 1024-25. Unlike Mr. Wilson, neither of the *Gamble* inmates' punishments was suspended and both inmates lost earned credits as a result of the misconduct conviction. However, one of the petitioners had additionally complained that the misconduct conviction resulted in his demotion from level four to level one. *Id.* at 1025.

We concluded that the Class X violation was supported by no evidence and that, as a result, the petitioners' due process rights had been violated. *See id.* at 1031-32. Significantly, as a remedy for this due process violation, we directed prison officials to reverse the misconduct convictions, expunge the convictions from the petitioners' records, restore all earned credits that had been revoked, *and* restore "their former statuses in earning credits." *Id.* at 1032.

In *Gamble,* we did not discuss whether the revocation of earned credits or the reduction in credit-earning status (from level four to level one) implicated the petitioners' liberty interests. "It is well settled" that an inmate must be afforded due process prior to the revocation of his earned credits. *Mitchell v. Maynard,* 80 F.3d 1433, 1444 (10th Cir. 1996). Mr. Wilson contends that, because we additionally restored the prisoners' pre-misconduct classification

statuses in *Gamble,* we implicitly held that a prisoner's mandatory classification demotion constitutes a liberty deprivation. Although we disagree with Mr. Wilson's characterization of our holding in *Gamble,* we believe that the remedy we granted does assist our analysis of Mr. Wilson's claim under *Sandin.* Given that the *Gamble* prisoners filed a § 2241 habeas petition, our restoration of credit-earning status suggests that a demotion resulting from a misconduct conviction has a direct, unattenuated impact on the duration of a prisoner's confinement. *See* 28 U.S.C. § 2241(c)(3) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States"); *see also McIntosh v. U.S. Parole Comm'n,* 115 F.3d 809, 812 (10th Cir. 1997) (explaining that a habeas petition under § 2241 may be granted only if the challenged state action "affect[ed] the . . . duration of the petitioner's custody").

3. Mr. Wilson's Misconduct Conviction

Upon review of Mr. Wilson's Class X misconduct conviction, we now expressly adopt the conclusion that *Gamble* suggests and *Sandin* requires: the misconduct conviction infringed a liberty interest because it reduced his credit earning class in a manner that "inevitably affect[ed] the duration of his sentence." *Sandin,* 515 U.S. at 487. As we have noted, as a direct result of the Class X misconduct conviction, Mr. Wilson was automatically demoted from a level-four credit earning classification to level one. Moreover, Oklahoma DOC policy prohibited Mr. Wilson from being considered for promotion beyond level two for a period of two years. Prison officials exercised absolutely no discretion over the imposition of these two

punishments and had no discretion to allow Mr. Wilson to avoid them. Okla. DOC Policies OP-060107(I)(C)(2)(a)(5); OP-060107(I)(C)(2)(c) & (d); OP-060103(a)(M). Thus, Mr. Wilson lost more than a mere opportunity to earn credits upon satisfactory completion of a job or program in the future. *See Zimmerman v. Tribble,* 226 F.3d at 571-72; *Higgason,* 83 F.3d at 809-10; *Bulger,* 65 F.3d at 50.

That lack of discretion contrasts markedly with the discretionary effect on the prisoner's chances of parole in *Sandin,* where the disciplinary infraction was only one of "a myriad of considerations," 515 U.S. at 487, that could affect whether the prisoner received an early release. In Mr. Wilson's case, the only consideration in his demotion and prevention from promotion was the misconduct conviction. These effects were not the result of prison officials' discretion after they considered a number of factors; rather they occurred solely, automatically, and mandatorily because of the misconduct conviction. This "but for" causation is the kind of "direct result" that *Sandin* requires for a disciplinary action to have an inevitable effect on a sentence. *See* 515 U.S. at 487 n.10.

We find additional support for this conclusion in the Seventh Circuit's opinion in *Montgomery v. Anderson,* 262 F.3d 641 (7th Cir. 2001). There, the Seventh Circuit held that Indiana prisoners are deprived of liberty when demoted to a lower credit-earning status. The court cited Supreme Court decisions holding that prisoners may have a liberty interest in the expectation of parole where the parole boards' discretion is limited by mandatory language in a statute or a regulation. Writing for the panel, Judge Easterbrook analogized the opportunity to earn credits toward early release to those parole cases, noting that "[a] hope to be released before the expiration of one's term on

good-time credits is no different in principle from a hope to be released on parole." *Id.* at 645. Judge Easterbrook examined the statute at issue and noted that it required prisoners to be assigned to a credit-earning class unless certain events occurred, thus "curtail[ing] administrators' discretion and . . . giv[ing] prisoners more than a subjective hope of receiving day-for-day credit." *Id.* The impact of a demotion in class level on the prisoner's sentence was directly traceable and clearly evident: but for the demotion, the prisoner would have continued to earn credits. *See id.* Thus, the Indiana statute created a liberty interest.

4. The State's Arguments

In maintaining that Mr. Wilson's conviction did not implicate a liberty interest, the State advances several arguments. We find none of them persuasive.

First, the State notes that prison officials have discretion to change an inmate's classification status. It contends that prison officials could have used that discretion to change Mr. Wilson's classification at any time and that, as a result, the misconduct conviction did not inevitably affect his sentence. In our view, the State ignores the fact that Mr. Wilson's conviction resulted in a *mandatory* change in credit-earning status. In light of that mandatory effect, the fact that prison officials have discretion to change a prisoner's classification *when considering other conduct* is irrelevant. As Judge Easterbrook observed in *Montgomery,* states have been held to create liberty interests in the expectation of early release even where the statute at issue "afforded plenty of discretion" to prison administrators. *Id.; see also Bd. of Pardons v. Allen,* 482 U.S. 369, 375-76 (1987) (explaining that an official "has

discretion if his duty is defined by standards that reasonable [people] can interpret in different ways" and that "the presence of official discretion in this sense is not incompatible with the existence of a liberty interest in parole release when release is *required* after the Board determines (in its broad discretion) that the necessary prerequisites exist") (quotation marks omitted) (alteration in original).

The State also directs us to a number of unpublished cases in this circuit that are somewhat similar to Mr. Wilson's case, although all but one pre-date *Gamble*. Those cases generally hold that a demotion in classification status does not necessarily implicate a liberty interest. Although we are not bound by these unpublished orders, we believe that they are distinguishable from the present case.

In *Hudson v. Ward*, the one post-*Gamble* case that the State cites, the classification demotion did not occur mandatorily as a result of a misconduct conviction but rather resulted from an ordinary exercise of prison officials' discretion. 124 F.App'x 599, 601-02 (10th Cir. Feb. 14, 2005) (unpublished); *see also Smith v. Okla. Dep't of Corr.*, 98 F.3d 1350 (10th Cir. Oct. 8, 1996) (unpublished) (holding that a loss of job for unsatisfactory performance, which resulted in a demotion in credit-earning status, does not implicate a liberty interest); *Brown v. Champion*, 61 F.3d 915 (10th Cir. July 24, 1995) (unpublished) (stating that the reclassification that resulted from a misconduct conviction was "entirely discretionary with prison officials"). *Davis v. Ward* presents a situation that is much like Mr. Wilson's case, but *Davis* was a pre-*Gamble* decision that could not take into account the published opinion's decision to restore prisoners' former credit-earning

statuses, nor did it consider the mandatory character of the prison regulation that removes discretion from prison officials.[1] 92 F.App'x 634, 635-36 (10th Cir. Feb. 9, 2004) (unpublished).

Finally, the State urges us to follow *Templeman v. Gunter,* 16 F.3d 367 (10th Cir. 1994), a published case that the magistrate judge cited in her recommendation that Mr. Wilson did not suffer a liberty deprivation. *Templeman* analyzed Colorado law and held that when a prisoner was transferred to administrative segregation, he was not deprived of a liberty interest because the regulation governing such a transfer stated that transfer was within "the sound exercise of discretion by the classification officer." *Id.* at 369. The prison regulation listed a few factors officials should consider prior to transfer, but specified that "the list is not exhaustive and includes any other reasons of similar magnitude deemed sufficient." *Id.* (citation and quotation omitted). Again, because prison officials had the discretion to reclassify the prisoner into administrative segregation, and "[o]nce there, Templeman did not meet the criteria for receiving earned time," the prisoner was not deprived of a liberty interest. *Id.* at 370.

Templeman is significantly different from the instant case in several respects. First, *Templeman* analyzed an

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[1] Another unpublished decision not cited by the State implied that *Gamble's* remedy should impact an analysis of whether a reclassification that results from an improper misconduct conviction deprives a prisoner of a liberty interest. *See Cook v. Ward,* 122 F.App'x 935, 937 n.5 (10th Cir. Dec. 14, 2004) (unpublished) (instructing prisoner to seek "administrative relief with respect to retroactive reinstatement of level 4 credits" and noting that "in *Gamble* . . . this court awarded a full restoration of benefits upon a finding of the denial of due process and no evidence to support misconduct convictions").

entirely different set of regulations than those that Oklahoma prison officials use. Second, unlike in Colorado, where officials had nearly unbridled discretion to transfer the prisoner, Oklahoma's prison officials must follow statutory and regulatory criteria when deciding whether to reclassify a prisoner. Finally, this court in *Templeman* relied upon the fact that the Colorado officials "reasonably concluded that inmates in administrative segregation do not meet . . . the criteria for receiving earned time." *Id.* Certainly prison officials' exercises of discretion should generally be respected, as "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin,* 515 U.S. at 482. Nonetheless, as we have repeatedly stressed, Mr. Wilson's reclassification did not occur because of an exercise of discretion, but rather was an automatic and mandatory sanction resulting from an erroneous misconduct conviction.

Accordingly, following *Sandin,* and for the reasons reviewed above, we hold that the Class X misconduct inevitably affected the duration of Mr. Wilson's sentence and therefore deprived him of a liberty interest. Because of this deprivation, we now examine whether the underlying misconduct conviction comported with due process

C. Misconduct Conviction

The Supreme Court has instructed that, when reviewing a prison disciplinary proceeding, courts should determine whether "any evidence in the record . . . could support the conclusion reached by the disciplinary board." *Hill,* 472 U.S. at 455-56. We applied this deferential standard of review in *Gamble* and held that no evidence

supported the petitioners' misconduct convictions. After examining section 1541.1, we concluded that, in order to affirm the misconduct conviction for obtaining money by false pretenses under the "any evidence" standard, "there must be evidence that the inmates attempted to obtain money by means of a trick, deception, or false representation. It is necessary that they *knew* it was a trick, deception, or false representation, and that they had the intent to cheat and defraud." *Gamble,* 375 F.3d at 1028.

The State has agreed that the decision in *Gamble* controls here and has acknowledged that no evidence exists to support Mr. Wilson's conviction. We appreciate this concession and hope that, in light of *Gamble* and the instant matter, the Oklahoma DOC will carefully oversee disciplinary proceedings and review its policies for ambiguities and contradictions so that such clearly problematic disciplinary actions are cured in an administrative setting, as they should be. As we noted in *Gamble,* "[t]he inmates' understanding that requesting disbursement from their mandatory savings for the costs of obtaining their transcripts was a legal request is justified under Oklahoma case precedent and legislative history." *Id.* at 1030.

The Oklahoma DOC policy in effect in 2001 regarding the use of a mandatory savings account was contradictory and confusing, especially in light of the state legislature's specific allowance for this one class of expenditures from mandatory savings accounts.[2] Indeed, amendments that

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[2] The policy stated correctly that "allowable fees are defined in O.S. 28, Section 151 *et seq*" but later, narrowed the range of allowable fees by calling them simply "filing fees," implying that filing fees were the only acceptable costs that could be paid from a mandatory savings account. Okla. DOC Policy OP-120230.

the state legislature made in 1995, permitting inmates to use mandatory savings accounts for costs associated with criminal cases and requiring courts to consider the availability of a mandatory savings account prior to granting in forma pauperis, "'compel[] a prisoner to weigh the validity of a lawsuit against the cost of pursuing it.'" *Id.* at 1031 (quoting *Smith v. Moore,* 50 P.3d 215, 218 n.4 (Okla. 2002)). The legislature's policy makes good sense: it alleviates public subsidization of court costs and deters prisoners from filing frivolous lawsuits, as they must use the small amount of savings they would have upon release from prison to pay for costs associated with their appeals. *See id.* Furthermore, "[i]t would make little sense to allow savings account monies to be used to file a case and then forbid their use to provide courts with materials useful in resolving that case." *Id.* at 1033 (Henry, J., concurring).

Due process in a prison setting is very limited, but some safeguards remain to ensure that the few rights prisoners do retain are not violated by prison officials' arbitrary exercise of their power. *See Wolff v. McDonnell,* 418 U.S. 539 (1974) (explaining that limited due process rights apply in a prison disciplinary setting because "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application"). Among these safeguards is the requirement that disciplinary convictions that mandatorily affect time served be supported by *some* evidence, which is a minimal but nonetheless important standard.

III. CONCLUSION

We hold that the State's action here deprived Mr. Wilson of a liberty interest because the mandatory and automatic consequences of the Class X misconduct conviction inevitably affected the duration of his sentence. Therefore, Mr. Wilson's due process rights were violated when he was convicted of misconduct without any evidence. The misconduct conviction must be reversed and expunged from his record, and his former status in earning credits must be restored.

The judgement of the district court is REVERSED and this matter is REMANDED for issuance of the writ.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LARRY WILSON,

Petitioner-Appellant,

v.

JUSTIN JONES, Director of the Oklahoma Department of Corrections; ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents-Appellees.

No. 02-6384

ORDER

Filed March 23, 2006

Before **HENRY,** Circuit Judge, **HOLLOWAY,** Senior Circuit Judge, and **LUCERO,** Circuit Judge.

The appellee's petition for rehearing is denied by the panel that rendered the decision.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. A poll was requested and a majority of the active judges voted to deny rehearing en banc.

Judges Tacha, Kelly, Briscoe, O'Brien, and Tymkovich all voted to grant the petition.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY WILSON,	)	
Petitioner,	)	
vs.	)	**CIV-02-301-F**
RON WARD,	)	
Respondent.[1]	)	

REPORT AND RECOMMENDATION

(Filed Nov. 7, 2002)

Petitioner, a state prisoner appearing *pro se*, brings this action pursuant to 28 U.S.C. § 2241, seeking a writ of habeas corpus.[2] Pursuant to an order entered by United States District Judge Stephen P. Friot, the matter has been referred to the undersigned Magistrate Judge for

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[1] Sam Calbone, Warden of the Great Plains Correctional Facility (GPCF) where Petitioner is incarcerated, was named by Petitioner as Respondent. GPCF, a private prison, is under contract with the Oklahoma Department of Corrections (DOC) to house inmates. The DOC bears responsibility for the "custody" and "supervision" of inmates housed in private prisons. *See* Okla. Stat. tit. 57, § 561(A). Therefore, Ron Ward, Director of DOC, who is the state officer having custody of Petitioner, has been substituted as the proper respondent. *See* Rule 2, Rules Governing Section 2254 Cases in the United States District Courts.

[2] Petitioner initiated this action on a form for proceedings involving 28 U.S.C. § 2254. However, he recognizes in his brief that because he is challenging the execution of his Oklahoma sentence, the action arises under 28 U.S.C. § 2241 rather than § 2254. *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000); *see also Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002) (construing a challenge to disciplinary sanctions "as a § 2241 petition").

initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). A response to the petition has been filed, and Petitioner has replied. Thus, the case is at issue. For the reasons set forth below, the undersigned recommends that the petition be denied.

Petitioner is currently serving a twenty-year sentence for first degree robbery in Case No. CRF-95-152, District Court of Murray County. However, he is not challenging either his conviction or sentence here. Rather, he contends that his conviction of a prison misconduct violated his rights under the First, Fifth, Sixth, and Fourteenth Amendments.

Background

On October 24, 2001, Petitioner was charged with a disciplinary misconduct, specifically, a law violation – obtaining money under false pretense in violation of Okla. Stat. tit. 21, § 1541.1. Petitioner's Brief in Support of Petition for Writ of Habeas Corpus (Brief), Ex. C. Following a hearing on November 2, 2001, Petitioner was found guilty of the offense. *Id.*, Ex. F. As punishment for this disciplinary offense, prison officials imposed sanctions of 30 days in disciplinary segregation and forfeiture of 180 days of earned credits with both sanctions suspended for 90 days. *Id.*

In a single ground for relief, Petitioner contends that his due process rights have been violated because the evidence was insufficient to prove the alleged offense. According to Petitioner, the violation has "subject[ed] [him] to cruel and unusual punishment under the 8th Amendment by having to serve a 'lengthier' prison sentence by

being deprived of earned credits levels and earned credits. . . . " Petitioner's Brief at 7.

Respondents contend that Petitioner has failed to exhaust his available state court remedies, and alternatively, that his claim lacks merit. For the reasons discussed more fully herein, the undersigned finds the petition fails to allege a constitutional deprivation, and recommends therefore that even if state remedies remain available, the petition should be denied.

Discussion

Although § 2241 does not contain an express exhaustion requirement, the Tenth Circuit has held that exhaustion is generally required in actions arising under Section 2241. *See Montez,* 208 F.3d at 866 ("A habeas petitioner is generally required to exhaust state remedies whether his action is brought under § 2241 or § 2254.") (citations omitted); *Hasson v. Williams,* No. 00-2206, 2000 WL 1289132 (10th Cir. Sept. 13, 2000) (finding district court properly dismissed § 2241 petition without prejudice for failure to exhaust).[3] Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel,* 526 U.S. 838, 842 (1999). In this circuit, a petitioner may satisfy this requirement by showing either (1) "that a state appellate court has had the opportunity to rule on the

[3] This and any other unpublished opinions cited herein are cited for their persuasive value in accordance with Tenth Circuit Rule 36.3.

same claim presented in federal court," or (2) "that at the time he filed his federal petition, he had no available state avenue of redress." *Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir.), *cert. denied*, 506 U.S. 924 (1992) (citation omitted); *see also Bear v. Boone*, 173 F.3d 782, 785 (10th Cir. 1999) ("In order to fully exhaust state court remedies, a state's highest court must have had the opportunity to review the claim raised in the federal habeas petition."). Petitioner ultimately bears the burden of showing that he has exhausted available state remedies. *Cooper v. McKinna*, No. 99-1437, 2000 WL 123753, at *1 (10th Cir. Feb. 2, 2000).

Respondent acknowledges that Oklahoma case law regarding the availability of a state court remedy for a prisoner's due process claim involving the right to have some evidence support prison disciplinary findings constitutes a "legal oddity." Response at 4. Nonetheless, Respondent asserts that a civil remedy is available to address Petitioner's claim. Specifically, Respondent contends the Oklahoma Supreme Court has "filled the void" created by the apparent lack of a remedy in the Oklahoma Court of Criminal Appeals. Response at 5. Petitioner argues that no remedy is available and that any further attempt to obtain state relief would be futile.

The undersigned finds that it is unnecessary to address the exhaustion issue because, as discussed hereafter, Petitioner has not shown the implication of a liberty interest sufficient to invoke the procedural protections of the Due Process Clause. Section 2241 relief is only available when a petitioner is in custody "in violation of the Constitutional or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Because Petitioner has not alleged a federal question cognizable in a federal habeas corpus

action, his petition may be denied despite any alleged failure to satisfy the exhaustion requirement. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *see also Montez,* 208 F.3d at 866 ("[B]ecause no credible federal constitutional claim is raised in Montez's petition, we conclude it is not inconsistent with § 2241 or our habeas corpus precedent to follow the policy of § 2254(b)(2) in this case).

It is well established that "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Sandin v. Conner,* 515 U.S. 472, 485 (1995). Thus, not every punitive measure taken against a prisoner invokes constitutional guarantees. In *Wolff v. McDonnell,* 418 U.S. 539 (1974), the Supreme Court recognized that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Id.* at 556. Because the Constitution does not guarantee that an inmate's sentence will be reduced with credit for good behavior or for any other reason, the Due Process Clause does not require that any particular procedures be followed in institutional disciplinary proceedings unless the state itself has created an interest in sentence credits that "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle [the inmate] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. If such a liberty interest in sentence credits has been created by the state, "an inmate's liberty interest in

his earned good time credits cannot be denied 'without the minimal safeguards afforded by the Due Process Clause of the Fourteenth Amendment.'" *Mitchell v. Maynard*, 80 F.3d 1433, 1445 (10th Cir. 1996) (citation omitted).

In Oklahoma, state law creates a liberty interest in earned credits. *See* Okla. Stat. tit. 57, § 138(A); *see also Waldon v. Evans*, 861 P.2d 311, 313 (Okla. Crimp. App. 1993) ("the State has created a liberty interest in earned credits"). As a result, inmates who earn sentence credits are entitled to due process protection before such credits may be taken away. *Mitchell*, 80 F.3d at 1445.

However, rather than actually having credits removed, Petitioner was subjected only to potential punishment as a result of the disciplinary infraction. The penalty imposed, 30 days of disciplinary segregation and forfeiture of 180 earned credits, was suspended for 90 days. *See* Petitioner's Brief, Ex. F. Moreover, the record shows that the 180 earned credits were never actually deducted. *See* Response, Ex. A, Petitioner's Consolidated Record Card. Because no earned credits were removed from Petitioner's sentence, Petitioner has not shown that the disciplinary proceeding resulted in any violation of the Due Process Clause. The Supreme Court in *Sandin* makes clear that only disciplinary measures which "will inevitably affect the duration of [the inmate's] sentence" or "work a major disruption in his environment" will be found to create a liberty interest sufficient to invoke the procedural protections of the Due Process Clause. *Sandin*, 515 U.S. at 485-87. Because no actual punishment was imposed upon Petitioner, the disciplinary measures imposed at the hearing did not either inevitably affect the duration of his sentence or significantly change his prison environment. Consequently, Petitioner has not shown that the suspended punishment

implicated any liberty interest protected by the Due Process Clause. *See Ontiveors v. Jacobson,* No. 94-4225, 1995, WL 257803, at *1 (10th Cir. May 3, 1995) ("The [petitioners] suspended [disciplinary] sentence did not affect any conditions of confinement and we therefore hold that it did not deprive [him] of a constitutionally protected liberty interest."); *Tucker v. Scott,* No. 91-7024, 1991 WL 99015, at *2 (10th Cir. June 6, 1991) (where Oklahoma inmate's earned credits were initially revoked but the revocation was subsequently suspended, inmate's claim of due process violation in connection with the revocation of his earned credits was moot); *cf. Montgomery v. El Paso County Sheriff's Dep't,* No. 97-1177, 1998 WL 104721, at *2 (10th Cir. March 10, 1998) (finding no protected liberty interest based on claim of denial of opportunity to earn credit where prisoner failed to show inevitable effect on the duration of his sentence).

Likewise, Petitioner's complaint that his classification level was reduced as a result of the disciplinary charge, fails to raise a credible constitutional claim. Petitioner's consolidated record card shows that his classification level was decreased to level one on October 24, 2001, when he was charged with the misconduct. Response, Ex. A at 3. Petitioner alleges that the misconduct security points received from this offense will prevent his possible classification advancement for two years. Petitioner's Reply at 3. In Oklahoma, the amount of earned credits that an inmate may receive is determined by his or her placement in one of four security classification levels. Okla. Stat. tit. 57, §138. However, "[c]hanging an inmate's prison classification ordinarily does not deprive him of liberty, because he is not entitled to a particular degree of liberty in prison." *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994).

Oklahoma prisoners have no constitutional right to remain at any particular classification level, and no constitutional liberty interest is implicated by an inmates's reclassification, even if the reclassification adversely affects the opportunity to earn sentence credits. *See Sandin*, 515 U.S. at 484 (state-created liberty interests which are protected by the Due Process Clause "will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life[]"); *Anderson v. Colo. Dep't of Corrections*, No. 98-1477, 1999 WL 387163 (10th Cir. June 14, 1999) (finding that the loss of an opportunity to earn good time credits does not constitute any atypical or significant hardship sufficient to create a liberty interest and cannot amount to a violation of due process) *cert. denied,* 528 U.S. 1165 (2000); *Smith v. Okla. Dep't of Corrections,* No. 96-7035, 1996 WL 576008 (10th Cir. Oct. 8, 1996) ("Oklahoma statute creating good time credits does not bestow upon inmates a property or liberty interest in the opportunity to earn those credits"); *Brown v. Champion,* No. 95-5061, 1995 WL 433221 (10th Civ. July 24, 1995) (*Sandin* makes clear that Oklahoma inmate has no constitutional liberty interest in reclassification by prison officials, and even under pre-*Sandin* view, the classification of Oklahoma inmates does not implicate the Constitution because it is "entirely discretionary" with Department of Corrections officials). The loss of an opportunity to earn sentence credits through security classification level changes, such as that which occurred as a result of Petitioner's disciplinary conviction, simply does not constitute an atypical or significant hardship upon an Oklahoma inmate in relation to the ordinary incidents of prison life. Thus, Petitioner had no constitutional right to a

classification that would have allowed the earning of a certain level of credits.

Because Petitioner has failed to allege a constitutional deprivation, it is recommended that the petition be denied.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned Magistrate Judge that the petition for a writ of habeas corpus be denied. Petitioner is advised of his right to object to this Report and Recommendation on or before the 27th day of November, 2002, in accordance with 28 U.S.C. §636 and Local Civil Rule 72.1, by filing his objections with the Clerk of this Court. Failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual findings and the legal issues contained herein. *Moore v. United States,* 950 F.2d 656, 659 (10th Cir. 1991). This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter. The Court Clerk is direct to mail a copy of this Report and Recommendation to Petitioner and to the Oklahoma Attorney General on behalf of Respondent.

ENTERED this 7 day of November, 2002.

/s/ Bana Roberts
BANA ROBERTS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY WILSON, Petitioner,	)	
vs.	)	Case No. CIV-02-0301-F
RON WARD, Respondent.	)	

ORDER

(Filed Nov. 21, 2002)

This matter comes before the court on Petitioner Larry Wilson's objections to the magistrate's Report and Recommendations. Petitioner's Objection (docket no. 13) was filed November 19, 2002. The Report and Recommendation ("Report," docket no. 12) which is the subject of that Objection was filed November 7, 2002. The Report recommends that Mr. Wilson's petition for a writ of habeas corpus be denied. The court considers the matter *de novo*.

The principal objection put forward by the petitioner is his disagreement with the magistrate's conclusion that petitioner has not shown a liberty interest to be at stake which is sufficient to invoke the procedural protections of the due process clause. Specifically, petitioner argues that his demotion to an earned credit class level one from earned credit class level four is punishment which raises a due process claim because that demotion ultimately results in a lengthening of petitioner's sentence. (Objection, pp.1-6.) Petitioner also argues that even if the magistrate's conclusion that prison officials have discretion to promote or demote inmates' earned credit levels is correct,

that discretion has been abused in his case. (Objection, p.6.)

After considering petitioner's objections, and after conducting its own review of the Report, the exhibits cited in the Report, the parties' submissions, the balance of the record, and the relevant legal authorities, the court finds and concludes that it concurs with the magistrate's determinations. The court further finds that no purpose would be served by repeating the magistrate's determinations or by presenting any additional analysis here.

Accordingly, the Report and Recommendation of Magistrate Judge Bana Roberts is hereby **AFFIRMED** and **ADOPTED** in its entirety. Petitioner's Writ of Habeas Corpus is **DENIED**.

Entered this 21st day of November, 2002.

/s/ Stephen P. Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY WILSON, Petitioner,	)	
vs.	)	Case No. CIV-02-0301-F
RON WARD, Respondent.	)	

JUDGMENT

(Filed Nov. 21, 2002)

In accordance with the court's order of this date denying petitioner Wilson's writ of habeas corpus, judgment is hereby rendered in favor of the respondent and against the petitioner.

Entered this 21st day of November, 2002.

/s/ Stephen P. Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

ORIGINAL

(2)

NO. 05-1618

Supreme Court, U.S.
FILED
JUL 20 2006
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JUSTIN JONES, Director of the Oklahoma Department of Corrections,

Petitioner,

v.

LARRY WILSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF LARRY WILSON IN OPPOSITION

Respectfully submitted,

RAYMOND P. MOORE
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY REVIEW BECAUSE THE TENTH CIRCUIT CAREFULLY APPLIED THIS COURT'S DECISION IN SANDIN V. CONNER AND BECAUSE THE ISSUE INVOLVED IS NOT ONE OF ANY PRESSING IMPORTANCE 5

A. The Tenth Circuit carefully applied Sandin and reached a conclusion consistent with this Court's teachings 6

B. The petitioner's other criticisms of the Tenth Circuit's opinion miss the point that, as this Court indicated in Sandin, disqualification from earlier release supports a liberty interest 11

C. The decision in Malchi v. Thaler, which does not address the aspects of Sandin that the Tenth Circuit analyzed, and which simply announces its conclusion, does not provide a good reason to grant review on an issue that is not of pressing concern 13

CONCLUSION 15

AFFIDAVIT OF SERVICE 16

AFFIDAVIT OF MAILING 18

TABLE OF AUTHORITIES

Pages

CASES

Gamble v. Calbone, 375 F.3d 1021 (10th Cir. 2004) 3

Malchi v. Thaler, 211 F.3d 953 (5th Cir. 2000) 13, 14

Montgomery v. Anderson, 262 F.3d 641 (7th Cir. 2001) 9

Sandin v. Conner, 515 U.S. 472 (1995) 3, 6, 7, 8

Superintendent, Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445 (1985) 3-4

Wilson v. Jones, 430 F.3d 1113 (10th Cir. 2005) 1, 2, 3, 4, 7, 9, 11, 12

Wolff v. McDonnell, 418 U.S. 539 (1974) 10

INTRODUCTION

Larry Wilson's "problem began with what seems an innocuous or even laudable action." Wilson v. Jones, 430 F.3d 1113, 1115 (10th Cir. 2005). He tried to use money in his mandatory-savings account at the Oklahoma Department of Corrections to pay a state court the costs of copying court documents he needed for post-conviction litigation. Id. Mr. Wilson noted this purpose on his request to access his funds. Id. at 1115-16. Oklahoma law permits the use of funds in mandatory-savings accounts to pay fees or costs in a civil or criminal action, and requires clerks of the district courts to charge fees for court-imposed costs and assessments. Id. at 1115 (describing Oklahoma law).

Prison officials nevertheless accused Mr. Wilson, in a disciplinary proceeding, with attempting to obtain money by false pretenses in violation of state law. Id. Based solely on Mr. Wilson's written request, they adjudged him guilty of this Class X misconduct. Id. at 1116.

As the petitioner admits, Petition for Writ of Certiorari ("Pet.") at 6, this conviction carried automatic penalties under state statute and prison regulations that the prison officials had no ability to suspend. Mr. Wilson was automatically demoted from level-four earning status, in which he had

been earning 44 credits a month -- credits that reduced his sentence *day for day* -- to level-one earning status, in which "was statutorily ineligible to earn any credits." Wilson, 430 F.3d at 1116. After thirty days at level one, he could potentially advance to level-two earning status, which enabled him to earn 22 credits a month towards reducing his sentence. Id.; Pet. at 6. But the misconduct conviction barred Mr. Wilson from being placed in either of the two higher levels, even if his conduct otherwise merited advancement, for two years. Wilson, 430 F.3d at 1116; Pet. at 6.

Prison officials also revoked 180 days of Mr. Wilson's earned time and ordered him to serve thirty days of disciplinary segregation. Wilson, 430 F.3d at 1116. This aspect of the punishment was suspended for ninety days and, as Mr. Wilson had clear conduct for that period, was not applied. Id.; Pet. at 6.

The Tenth Circuit determined Mr. Wilson had a liberty interest under the Due Process Clause given the mandatory disqualification from earning credits that reduced his sentence. The court stressed the automatic nature of the disqualification, which allowed for no exercise of discretion by prison officials. Wilson, 430 F.3d at 1116, 1120-21, 1123, 1124. It held that,

under Sandin v. Conner, 515 U.S. 472 (1995), there was the direct and unattenuated effect on the duration of his sentence that supports a liberty interest. Wilson, 430 F.3d at 1121.

In reaching this conclusion, the Tenth Circuit drew a contrast with the situation in Sandin. The circuit observed that this Court had explained that the misconduct conviction there did not require the denial of parole, but was just one factor that officials could consider. Wilson, 430 F.3d at 1118 (discussing Sandin, 515 U.S. at 487). The effect on the duration of the sentence was thus too attenuated and could not support a liberty interest. Id. But here, because the misconduct conviction mandated action that precluded the award of credits that would reduce Mr. Wilson's sentence, there was the requisite direct impact on the length of his sentence. Id. at 1121.

The Tenth Circuit also concluded, based on its earlier decision in Gamble v. Calbone, 375 F.3d 1021 (10th Cir. 2004), that the discipline could not lawfully be imposed, and so there was insufficient evidence in the record to support it. Wilson, 430 F.3d at 1123-24. The conviction therefore did not comport with the due process under the test of Superintendent,

Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445 (1985). Wilson, 430 F.3d at 1123.

By the time the Tenth Circuit's decision was implemented, Mr. Wilson was about to complete his sentence. His release, with good time required by the decision, came just two days before his sentence was otherwise set to expire.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY REVIEW BECAUSE THE TENTH CIRCUIT CAREFULLY APPLIED THIS COURT'S DECISION IN SANDIN V. CONNER AND BECAUSE THE ISSUE INVOLVED IS NOT ONE OF ANY PRESSING IMPORTANCE.

The petitioner maintains that this case involves the right to be in a particular classification for earning credits towards early release. E.g., Pet. at i, 3-4, 6, 9, 13. He then asserts the Tenth Circuit decided this qualified as a liberty interest by looking for mandatory language in state regulations. Id. at 12. From these premises, the petitioner concludes the Tenth Circuit ran afoul of this Court's decision in Sandin v. Conner.

The petitioner has distorted both the issue and the Tenth Circuit's approach. This case does not involve an assignment to an earning status that can depend on a range of factors, and that arises from the exercise of official discretion. Instead, this case involves the *automatic disqualification* from higher earning levels because of a misconduct conviction, and which *precludes the exercise of discretion*. The only mandatory language the Tenth Circuit considered was that which made automatic this discretion-stripping penalty for the (unconstitutional) misconduct conviction.

Properly viewed, this case poses no conflict whatever with Sandin. The petitioner's argument that it does is fueled by his failure to appreciate the significance of the fact that this case involves action that "inevitably affect[ed] the duration of [the] sentence." Sandin, 515 U.S. at 487. The Tenth Circut made the very inquiry that this Court has directed when the asserted claim is an effect on a sentence's duration. And the circuit's conclusion is supported by this Court's observation of what was, in this regard, lacking in Sandin. The conviction in Sandin, this Court noted, did not require denial of parole. The conviction here did have such a preclusive effect on earlier release.

A. The Tenth Circuit carefully applied Sandin and reached a conclusion consistent with this Court's teachings.

This Court's concern in Sandin was with a search for liberty interests that are protected by the Due Process Clause that is divorced from what is at stake. Sandin, 515 U.S. at 482-84. It is not enough, this Court instructed, that a state rule mandates certain treatment. Instead, State action creates a protected liberty interest only if it implicates an independently weighty interest. Id. at 484. The interest must generally be one that imposes

"atypical and significant hardship" relative to ordinary prison life. Id. This includes disciplinary actions that "inevitably affect the duration of [the] sentence." Id. at 487.

The Tenth Circuit faithfully followed this approach. Its opinion was always focused on the "nature of the deprivation." Id. at 481. The opinion stressed there had to be a direct, unattenuated impact on the sentence for Mr. Wilson to have a liberty interest under Sandin. Wilson, 430 F.3d at 1117, 1119, 1120. Likewise, the opinion tested the effect of the misconduct conviction against this standard. Id. at 1120-21, 1123.

The petitioner is thus quite wrong in portraying this case as a court's search for mandatory regulations for their own sake. The Tenth Circuit did not, as the petitioner would have it, only "purport[]" to invoke the test of an effect on the duration of Mr. Wilson's sentence. Pet. at 12. Rather, this was the true, and eminently correct, "focus[]" of the circuit's opinion. Id.

Of course, the Tenth Circuit also considered whether the misconduct conviction mandated a disqualification from particular earning statuses. But the circuit court could hardly have done otherwise. If the conviction were only a factor prison officials could consider in deciding what credits

could be earned, there would be no inevitable effect on the duration of Mr. Wilson's confinement. There would only be a potential impact on how long he served. The misconduct conviction would be simply one of "a myriad of considerations" that affected what credits he received. Sandin, 515 U.S. at 487. In that scenario, the chance the conviction would "alter the balance" of when Mr. Wilson would be released, would be "too attenuated to invoke the procedural guarantees of the Due Process Clause." Id.

This was the case in Sandin, where the misconduct conviction did not have an automatic impact on parole, but was only a factor the board could consider. This Court emphasized this fact in holding that Hawaii had not created a liberty interest. "Nothing in Hawaii's code requires the parole board to deny parole in the face of a misconduct record or to grant parole in its absence, even though misconduct is by regulation a relevant consideration." Id. (citation omitted).

But what was missing in Sandin is, as the Tenth Circuit held, present here. The misconduct conviction *required* prison officials to demote Mr. Wilson to level one and prevented them from advancing him beyond level two for two years. These consequences -- which made him categorically

ineligible to earn any credits for a month, and made him categorically ineligible to earn credits at higher rates for a full two years -- "occurred solely, automatically, and mandatorily" because of the conviction. Wilson, 430 F.3d at 1121. Just as a regulation that calls for automatic denial of parole on conviction for misconduct implicates a liberty interest, so do the provisions here that automatically prevented Mr. Wilson from earning credits at particular rates regardless of whether he otherwise would be eligible to do so.

The Tenth Circuit correctly applied Sandin. As Judge Easterbrook explained in Montgomery v. Anderson, the credit and parole contexts are analogous: "[a] hope to be released before the expiration of one's terms on good-time credits is no different in principle from a hope to be released on parole." 262 F.3d 641, 645 (7th Cir. 2001). So, the Tenth Circuit was right to look at whether the misconduct conviction disqualified Mr. Wilson from earning credits.

The liberty interest here is not to be "in a particular credit-earning level." Pet. at i. Rather, it is in a disciplinary proceeding that results in the automatic disqualification to be able to earn credits that reduce a sentence.

The analogy to the parole context is again useful. A prisoner does not have a liberty interest in a discretionary parole determination. But a prisoner does have a liberty interest in State action that removes discretion and requires denial of parole.

The petitioner's claim that in deciding there was a liberty interest the Tenth Circuit has thrust itself into the day-to-day management of prisons, Pet. at 8, is erroneous. Misconduct convictions that result in revocation of good-time credits implicate a liberty interest. Wolff v. McDonnell, 418 U.S. 539, 557 (1974). Given that this is a frequent penalty for such disciplinary proceedings, the federal courts routinely review whether such proceedings comport with the Due Process Clause. It was part of the penalty here and, had it not been suspended, there would be no question at all but that there was a liberty interest.

Also, as the Tenth Circuit was at pains to emphasize, this case does not implicate the discretion of prison officials because the regulation mandates demotion and disqualification from advancement in earning status upon conviction. "Prison officials exercised absolutely no discretion over the imposition of these two punishments and had no discretion to

allow Mr. Wilson to avoid them." Wilson, 430 F.3d at 1120-21; see also id. at 1123 ("as we have repeatedly stressed, Mr. Wilson's reclassification did not occur because of an exercise of discretion").

B. The petitioner's other criticisms of the Tenth Circuit's opinion miss the point that, as this Court indicated in Sandin, disqualification from earlier release supports a liberty interest.

Ironically, the petitioner, who unrelentingly criticizes the Tenth Circuit's opinion for considering in any way whether the state regulations have a mandatory effect on the earning of credits, devotes an entire section of his petition to the supposedly non-mandatory nature of the regulations. See Pet. at 13-16. The petitioner maintains the Tenth Circuit has erred in its interpretation of the Oklahoma regulations. Of course, if the petitioner is right that the opinion may be flawed for this reason, then this certainly is not an appropriate case in which to grant review. This Court does not sit to decide the proper interpretation of state regulations.

This argument is conceptually misguided also. The petitioner's point seems to be that Mr. Wilson might for other reasons have been demoted or failed to earn credits at higher rates. But the same argument could be

made in the parole context. State action that precludes parole, it could be asserted, does not implicate a liberty interest because the board might deny parole even were it not for the action. Nevertheless, this Court in Sandin indicated that action that mandated denial of parole gave rise to a liberty interest.

The disqualifying effects of the misconduct conviction here should not be treated differently. As the Tenth Circuit aptly observed, given the "*mandatory* change in credit-earning status . . . the fact that prison officials have discretion to change a prisoner's classification *when considering other conduct* is irrelevant." Wilson, 430 F.3d at 1121 (emphasis in original). The petitioner, as the Tenth Circuit noted, "ignores the fact that Mr. Wilson's conviction resulted in a *mandatory* change in credit-earning status." Id. (emphasis in original).

The petitioner's contention that the Tenth Circuit viewed the effect on the duration of confinement in hindsight, and not prospectively, Pet. at 16-19, likewise fails. This position is largely tied to the one just debunked. The petitioner claims the Tenth Circuit ignored that other decisions could have caused Mr. Wilson's demotion in earning credits. Id. at 17. This is

not meaningfully different from the contention, which Sandin implicitly rejects, that there is no liberty interest implicated by disqualification from parole eligibility because subsequent events might independently result in the denial of parole.

Contrary to what the petitioner maintains, the Tenth Circuit in fact viewed the impact of the misconduct conviction "from the point in time when the action [was] taken." Pet. at 17. At that point, the conviction's preclusive effects going forward were apparent. It was these preclusive effects that gave rise to the liberty interest.

C. The decision in Malchi v. Thaler, which does not address the aspects of Sandin that the Tenth Circuit analyzed, and which simply announces its conclusion, does not provide a good reason to grant review on an issue that is not of pressing concern.

Finally, the petitioner's assertion of a purported conflict between this case and Malchi v. Thaler, 211 F.3d 953 (5th Cir. 2000), see Pet. at 19-21, does not make review appropriate here. The opinion in Malchi does not address the portions of Sandin relied upon by the Tenth Circuit, and discussed in this brief. The opinion does not at all consider the preclusive effect of a misconduct conviction on earning status. It merely announces

the conclusion that the timing of release there was too speculative to create a liberty interest. Malchi, 211 F.3d at 959.

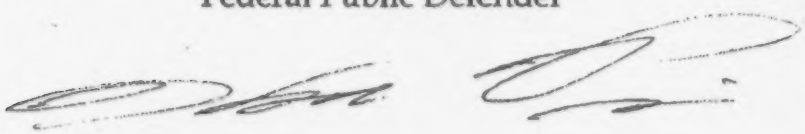
With the debate at best incompletely joined, there is no need for this Court to take up the issue now. The issue is evidently not one of pressing importance, as the petitioner identifies just a single case that supposedly conflicts with the Tenth Circuit's decision. The Tenth Circuit's approach is solidly rooted in Sandin. Any courts to confront the issue in the future will presumably address the reasoning of the decision here. If they do so, and in the event they read Sandin to require a different result, this Court can review the issue then with the benefit of a fuller discourse in the circuit courts.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

RAYMOND P. MOORE
Federal Public Defender



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NO. 05-1618

IN THE

SUPREME COURT OF THE UNITED STATES

JUSTIN JONES, Director of the Oklahoma Department of Corrections,

Petitioner,

v.

LARRY WILSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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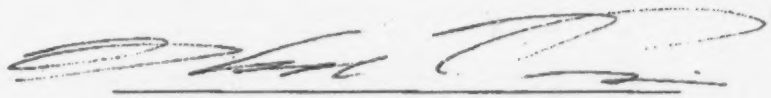
AFFIDAVIT OF SERVICE

HOWARD A. PINCUS, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth

Circuit was served on counsel for the Petitioner by enclosing a copy of this document in an envelope, first-class postage prepaid and addressed to:

Jennifer B. Miller
Assistant Attorney General
2300 N. Lincoln Blvd., Room 112
Oklahoma City, OK 73105

and that the envelope was deposited with the United States Postal Service, Denver, Colorado 80202, on July 20, 2006, and further attests that all parties required to be served have been served.



HOWARD A. PINCUS
Assistant Federal Public Defender

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 20th day of July, 2006.

Socorro L. West
Socorro L. West
Notary Public

My Commission Expires: 11-03-2006

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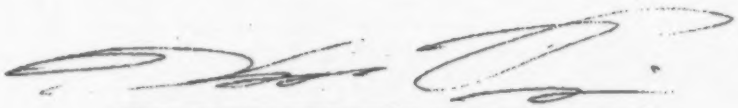
AFFIDAVIT OF MAILING

HOWARD A. PINCUS, Assistant Federal Public Defender, and a member of the bar of the United States Supreme Court, attests that he

placed the foregoing Brief in Opposition in the United States mail on July 20, 2006.



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